

**EDITOR'S NOTE:** Footnote 4 appeared on page preceding its flag in original.

GRAYS KNOB COAL CO.  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-364

Decided June 24, 1987

Petition for discretionary review of a decision of Administrative Law Judge Frederick A. Miller affirming issuance of cessation order and proposed assessment of civil penalties. NX 2-37-P.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Where the permittee has failed to abate a violation within the time set for abatement in a notice of violation, the Office of Surface Mining Reclamation and Enforcement is obligated by sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (1982), to issue a cessation order.

2. Board of Land Appeals -- Regulations: Applicability -- Surface Mining Control and Reclamation Act of 1977: Abatement: Generally

The Board of Land Appeals need not decide whether a permittee could retroactively take advantage of an amended regulation allowing for extensions of the abatement period where there is no evidence in the record which would show affirmatively the permittee's entitlement to such an extension, even if it were available.

3. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally -- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally -- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

The Board has no authority to waive or reduce a civil penalty assessed at the statutory minimum pursuant to sec. 518(h) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(h) (1982), and 30 CFR 723.15(b) for failure to abate a violation within the time allowed.

APPEARANCES: William A. Rice, Esq., Harlan, Kentucky, for appellant; Bruce T. Hill, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE HARRIS

By order dated February 26, 1985, the Board granted a petition filed by the Grays Knob Coal Company for discretionary review of a decision of Administrative Law Judge Frederick A. Miller, dated January 14, 1985, affirming the issuance of cessation order (CO) No. 80-2-94-2 and the proposed assessment of civil penalties in the amount of \$22,500 by the Office of Surface Mining Reclamation and Enforcement (OSMRE), in connection with petitioner's operation of a coal tippie and refuse area in Harlan County, Kentucky. The decision of Judge Miller followed a hearing held in London, Kentucky, on November 30, 1984.

The facts of this case are essentially undisputed. On November 14, 1979, following an inspection of petitioner's tippie and refuse area, Daniel Ross, an OSMRE inspector, issued notice of violation (NOV) No. 79-2-94-15 to petitioner in part for "[f]ailure to cover acid-forming, toxic-forming, combustible material with a minimum of four feet of non-toxic and non-combustible material," in violation of 30 CFR 717.14(e) (OSMRE Exh. 1). The specific site of the violation was the refuse disposal area along Mill Creek. The inspector required petitioner to cover the "first two benches" and regrade and revegetate them by January 16, 1980. *Id.* The inspector noted that the uncovered benches posed a pollution and sedimentation threat to the nearby Mill Creek. On December 20, 1979, Ross extended the abatement time to February 12, 1980. After a follow-up inspection on February 22, 1980, Ross issued CO No. 80-2-94-2 because petitioner had not completed "any of the remedial measures" within the time set for abatement (OSMRE Exh. 8). On February 25, 1980, Ross modified the CO to require that operations on the lower two benches of the refuse disposal area cease immediately. On April 8, 1980, Ross terminated the CO because an inspection disclosed that petitioner "had completed the remedial measures by covering the lower benches with topsoil & seeding them" (OSMRE Exh. 9). OSMRE subsequently proposed assessment of civil penalties of \$22,500.

[1] Petitioner does not dispute the fact that it initially failed to comply with 30 CFR 717.14(e), which requires that:

Any acid-forming, toxic-forming, combustible materials, or any other waste materials \* \* \* shall, after placement in accordance

with 717.15 of this part, be covered with a minimum of 4 feet of nontoxic and noncombustible material; or, if necessary, treated to neutralize toxicity, in order to prevent water pollution and sustained combustion, and to minimize adverse effects on plant growth and land uses.

Moreover, petitioner does not challenge the fact that it failed to abate this violation within the time set for abatement in the NOV, and subsequently extended (Tr. 36). Judge Miller concluded that OSMRE properly issued the CO for failure to abate the violation. We agree. Indeed, in such circumstances, OSMRE is obligated by section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(3) (1982), and 30 CFR 722.13 to issue a CO. B&J Excavating Co. v. OSMRE, 89 IBLA 129, 135 (1985); Hayden & Hayden Coal Co., 2 IBSMA 238, 87 I.D. 414 (1980).

Petitioner's principal argument throughout these proceedings has been that its actions constituted a "paper violation" for which it should not be assessed civil penalties. Petitioner contends that it properly delayed undertaking the remedial measures set forth in the NOV until after the abatement period because these measures would have caused more environmental damage than was taking place during the abatement period. Petitioner explained, relying on the testimony of Michael McClure, its chief engineer, that removing topsoil from a nearby area and placing it on the refuse disposal area during the "generally" wet winter months posed a greater threat to the environment from sediment runoff than leaving the disposal area uncovered (Tr. 32). McClure testified that

the company elected the position that the time of year that we were in and the anticipated time it would take to finish the reclamation, that we couldn't adequately do it and get a vegetation cover on it quick enough without doing more environmental damage and causing more siltation that [sic] it would be if we waited until the first of spring.

Id.

Judge Miller concluded that he could make no finding regarding the "inclemency" of the weather during the abatement period because of a lack of evidence. Indeed, Ross and McClure both were unable to offer specific evidence as to the state of the weather (Tr. 15, 37). However, Ross was of the opinion that petitioner could have accomplished the remedial work during the abatement period (Tr. 26) and McClure was unable to testify that it could not have been (Tr. 38). Nevertheless, it is apparently petitioner's position that the prudent course of action at the time was to delay doing the remedial work given the possibility or probability, during the winter months, that topsoil could not be removed, placed, and stabilized before the onset of inclement weather.

[2] Petitioner points out that while the regulation in effect at the time the NOV and CO were issued did not permit an extension of time for the abatement of a violation beyond 90 days (see 30 CFR 722.12(d) (1979)), which

was the total time allowed petitioner, the regulation has since been amended. See 46 FR 41702 (Aug. 17, 1981). The current regulation permits an extension of time exceeding 90 days where the permittee shows "it is not feasible to abate the violation within 90 calendar days" and the failure to abate within the 90 days has not been caused "by a lack of diligence or intentional delay by the permittee in completing the remedial action required." 30 CFR 722.12(d). Circumstances which may qualify for an abatement time of more than 90 days include "where climatic conditions preclude abatement within 90 days, or where, due to climatic conditions, abatement within 90 days clearly: (i) would would cause more environmental harm than it would prevent." 30 CFR 722.12(e)(4). Petitioner concludes that if the current regulations had been in effect, it could have secured an extension of time and avoided the civil penalty.

We have on occasion applied an amended regulation to benefit an affected party in a pending matter where to do so did not contravene intervening rights or public policy considerations. Mont Rouge, Inc., 90 IBLA 3 (1985); James E. Strong, 45 IBLA 386 (1980). However, in this case we need not determine whether appellant could take advantage of the amended regulations, because even if the regulations were applicable, there is no evidence in the record to affirmatively show appellant's entitlement to such an extension.

In this case, there is no proof that petitioner was precluded from undertaking the remedial action by climatic conditions extant throughout the 90-day period of time between November 14, 1979, and February 12, 1980. Moreover, there is not "clear and convincing proof" (30 CFR 722.12(g)) that throughout this time period climatic conditions were such that any remedial action taken "would cause more environmental harm than it would prevent" (30 CFR 722.12(e)(4)). Although McClure testified that greater environmental harm would have resulted from proceeding with abatement, Ross was of the contrary opinion (Tr. 23, 32). Moreover, a retroactive application of the amended regulations would appear to frustrate certain safeguards contained therein, i.e., the opportunity to impose interim abatement measures (30 CFR 722.12(f)) and to grant an extension of the abatement period for "the shortest possible time necessary to abate the violation" (30 CFR 722.12(g)).

[3] Finally, petitioner argues that the Board has the "inherent power" and authority under the regulations, specifically, 43 CFR 4.1270(f) and 30 CFR 723.16, to waive or recalculate assessments of civil penalties. Although the Board does have the authority to waive use of the civil penalty formula set forth at 30 CFR 723.13 and 723.14, the assessment in this case, as we will demonstrate, was not the subject of the civil penalty formula.

Section 518(a) of SMCRA, 30 U.S.C. § 1268(a) (1982), provides that the Secretary "may" assess a civil penalty of not more than \$5,000 with respect to any permittee "who violates any permit condition or who violates any other provision of this subchapter." It also provides, however, that when such violation leads to the issuance of a cessation order, a civil penalty "shall" be assessed. The statute sets forth certain factors that should be considered

"[i]n determining the amount of the penalty." <sup>1/</sup> 30 U.S.C. § 1268(a) (1982). These factors are implemented by the point system and conversion table described, respectively, in 30 CFR 723.13 and 723.14. In addition, 30 CFR 723.16(a) provides that the Director of OSMRE "may waive the use of formula \* \* \* to set the civil penalty, if \* \* \* taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust." In a proceeding to review the proposed assessment of a civil penalty, an Administrative Law Judge and the Board, likewise, have the authority to recalculate the assessment using the point system and conversion table or to waive use of the civil penalty formula. 43 CFR 4.1157(b)(1) and 4.1270(f).

In addition to authorizing the penalties calculated under section 518(a), section 518(h) of SMCRA states that "[a]ny operator who fails to correct a violation for which a citation has been issued under section 1271(a) of this title within the period permitted for its correction \* \* \* shall be assessed a civil penalty of not less than \$750 for each day during which such failure or violation continues." <sup>2/</sup> (Emphasis added.) 30 U.S.C. § 1268(h) (1982); see 30 CFR 723.15(b). The point system and conversion table are not applicable to this mandatory assessment of civil penalties. Likewise, no authority exists for either OSMRE, an Administrative Law Judge, or the Board to waive such an assessment. As we said in Peabody Coal Co. v. OSMRE, 90 IBLA 186, 194, 93 I.D. 1, 5 (1986), which also involved the assessment of civil penalties pursuant to section 518(h) of SMCRA and 30 CFR 723.15(b) in the case of a failure-to-abate CO: "[W]e find no authority in the statute and regulations for consideration of mitigating factors such as inability to comply [see 30 CFR 722.17(c)] or good faith effort of the permittee to comply [see 30 CFR 723.13(b)(4)] in assessing the statutory minimum penalty." The statute and regulations, in fact, preclude the Board from waiving or reducing the statutory minimum failure-to-abate civil penalty. <sup>3/</sup>

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<sup>1/</sup> These factors are the permittee's history of previous violations, the seriousness of the violation, any negligence on the part of the permittee, and demonstrated good faith by the permittee in attempting to rectify the violation. 30 U.S.C. § 1268(a) (1982).

<sup>2/</sup> Section 518(h) of SMCRA also makes clear that the time period for correction of a violation can be extended "until the entry of a final order by the Secretary" if the operator initiates review proceedings under section 525 of SMCRA, 30 U.S.C. § 1275 (1982), and the Secretary orders, upon a showing of irreparable loss or damage, suspension of the abatement requirements. In these circumstances, the operator would be permitted additional time to abate the violation. In the present case, petitioner did not seek review of either the NOV or the CO under section 525 of SMCRA. Nor did it seek temporary relief from the NOV or CO (Tr. 35-36).

<sup>3/</sup> Judge Miller also correctly declined to reduce or vacate the civil penalty imposed because petitioner could not cite appropriate "authority."

Accordingly, we conclude that OSMRE properly proposed the assessment of civil penalties in the amount of \$22,500 where it is clear these penalties were assessed pursuant to section 518(h) of SMCRA and 30 CFR 723.15(b). 4/

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Frederick A. Miller is affirmed.

Bruce R. Harris  
Administrative Judge

We concur:

Gail M. Frazier  
Administrative Judge

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4/ The civil penalties were calculated on the basis of the statutory minimum of \$750 per day, but limited to the 30 days following petitioner's failure to abate by Feb. 12, 1980, in accordance with 30 CFR 723.15(b)(2).

